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Supreme Court of the United States.

OCTOBER TERM, 1943.

FRANK W. LYMAN ET AL., EXECUTORS,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

AMOS L. TAYLOR,
Attorney for Petitioners.

FRED J. JOHNSON,
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INDEX.

	Page
PETITION	1
Opinions below	1
Jurisdiction	2
Statement of the matters involved	2
Question presented	4
Reasons for granting the writ	5
BRIEF	7
Argument	7
Conclusion	12

TABLE OF AUTHORITIES CITED.

Chicago & Alton R.R. Co. v. Union Rolling Mill Co., 109 U.S. 714	8
Cohens v. Virginia, 6 Wheat. 264	9
Mutual Life Ins. Co. v. Krejci, 123 Fed. (2d) 594	9, 10
Postal Telegraph & Cable Co. v. Newport, 247 U.S. 464	10
Prudential Ins. Co. v. Stack, 60 Fed. (2d) 831	8
Republic Steel Co. v. Richfield Oil Co., 74 Fed. (2d) 907	11
State of Kansas v. Occidental Life Ins. Co., 95 Fed. (2d) 937	10
Widdows v. Keaton, 44 Fed. (2d) at p. 841	8
Federal Rules of Civil Procedure, Rule 41	9
Federal Rules of Civil Procedure, Rule 41 (a) 2	9
Federal Rules of Civil Procedure, Rule 56	10
Mass. Gen. Laws, c. 198, sec. 11	11
Mass. Gen. Laws, c. 198, sec. 13	11
Mass. Gen. Laws, c. 198, sec. 31	11
Proceedings of the American Bar Assoc. Inst., p. 183, par. 3	8

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioners, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the First Circuit, rendered on October 18, 1943, in the case of *Frank W. Lyman et al., Executors* (*Defendants, Appellants*), v. *United States of America* (*Plaintiff, Appellee*).

Opinions Below.

The opinion of the Circuit Court of Appeals appears at pages 27 and 28 of the Record, and is not reported. A former opinion was reported at 125 Fed. (2d) 67.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on October 18, 1943 (R. 27). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U.S.C. Section 347.

Statement of the Matters Involved.

The case involves the first cause of action only. According to the declaration (R. 3), the income tax was assessed May 25, 1931 (R. 4). The writ is dated May 18, 1938 (R. 2). The defendant pleaded the Statute of Limitations (R. 8), the action being obliged to be brought within six years of the date of the assessment. At the opening of the trial of the case in the District Court, counsel for the plaintiff there stated (R. 20): "As to the first cause of action, it appears on the face of the complaint that this suit is not timely with respect to that cause of action"; and then continued further: "We therefore, with the permission of the court, withdraw that cause of action from this suit. I believe that a stipulation will be entered into between the parties withdrawing that cause of action, and that it is not before the Court."

No stipulations were filed. Upon completion of the actual trial of the case counsel for defendant stated to the Court (R. 21 and 22):

> "[Counsel for defendant.] May it please your Honor, as I understand it now we are going to prepare something that is going to be equivalent to the dismissing and final adjudication of count 1.
>
> "The Court. I understand count 1 has been waived.
>
> "[Counsel for plaintiff.] It has been withdrawn.

"[Counsel for defendant.] I understood we were going to file some stipulations.

"The Court. You can if you want. You don't need to. Count 1 is clear out of this case."

No stipulations being filed, the defendant then made a motion (R. 8) for a directed verdict. The Court then stated (R. 22): "If that count is not before the court how could you properly ask me to make a finding with reference to it if it is not before me?" On December 13, 1940, the District Court gave judgment (R. 9), but it made no reference to the first cause of action.

On March 28, 1941, the defendant filed a motion (R. 10) stating that, by error or oversight, the Court had failed to give judgment for the defendant, and moved that the Court order judgment. On March 31, 1941, the Court gave judgment (R. 11) to the defendant on the said cause of action. On April 28, 1941, the plaintiff moved to vacate this judgment (R. 11). The Court, on May 13, 1941, dismissed the said motion to vacate (R. 14).

The plaintiff then appealed to the Circuit Court of Appeals and set out in the appeal a statement of points (R., separate sheet) as follows:

First: That the District Court erred in granting *ex parte* the order entered March 28, 1941, granting appellees' motion for judgment on the first cause of action, in that appellees' motion to amend said judgment was made more than ten days after the entry thereof and the District Court was without jurisdiction to grant said motion and to amend said judgment.

Second: That the District Court erred in denying appellant's motion to vacate the order entered March 31, 1941, granting appellees' motion to amend the judgment entered

on December 13, 1940, for the reason the said order entered on March 31, 1941, was without authority of law and was beyond the jurisdiction of the District Court.

The Circuit Court of Appeals, in the opinion reported at 125 Fed. (2d) 67, remanded the case to the District Court with leave to the plaintiff to move under the Federal Rules of Civil Procedure, Rule 41 (a) 2, to dismiss the cause of action, and, in the same opinion, vacated the amended judgment entered March 31, 1941 (R. 11). With the authority from the same opinion, the plaintiff, on May 18, 1942 (R. 14), moved to dismiss the action.

The Court, on June 19, 1942 (R. 15), allowed the motion dismissing the first cause of action "with prejudice to any action upon the first cause of action in its declaration that may hereafter be commenced, but without prejudice to the right of the plaintiff to prosecute any other timely proceeding upon the subject matter now pending in another court." The timely proceeding therein referred to is one based on the same cause of action between the same parties pending in the Probate Court for the County of Middlesex, Massachusetts (R. 13).

The defendant appealed to the Circuit Court of Appeals, and, in an opinion not reported (R. 27), the Court there stated they saw no error in the exercise of its discretion by the trial Court in dismissing the action.

Question Presented.

Did the District Court, in acting on the motion of the plaintiff, have the discretionary power to dismiss, conditional or otherwise?

Reasons for Granting the Writ.

1. The Court did not have the discretionary power to dismiss because, first, it was apparent from the record that the Statute of Limitations applied; the plaintiff admitted the action was not timely brought, and stated he believed a stipulation would be entered, and that the action was not before the Court. As far as the Court was concerned, the withdrawing was conditional upon the entry of a stipulation, without the entry of which the Court was bound to dispose of the action based on the merits as they were before the Court at the time of entering judgment.

2. With the plea of the Statute of Limitations applying, and the admission by the plaintiff that the action was not timely brought, the case had then progressed so far as to entitle the defendant to judgment.

3. The jurisdiction was created by legislative act of Congress, and the Court could not then refuse to exercise jurisdiction when it was invoked by appropriate proceedings.

4. The Court, in refusing to take jurisdiction, has deprived the plaintiff of property and rights without due process of law.

5. The Federal Rules of Civil Procedure relate to pleading, practice and procedure and do not affect substantive rights. Statutes of Limitations are matters of substantive law, and the defendant cannot be denied a substantive right.

6. The Federal Rules of Civil Procedure, Rule 41 (a) 2, do not give the Court arbitrary power to dismiss; said rule has not enlarged the discretionary power of the Court to dismiss; it merely refers to method and manner.

7. The Circuit Court of Appeals, in the case reported 125 Fed. (2d) 67, erred in vacating the judgment after the

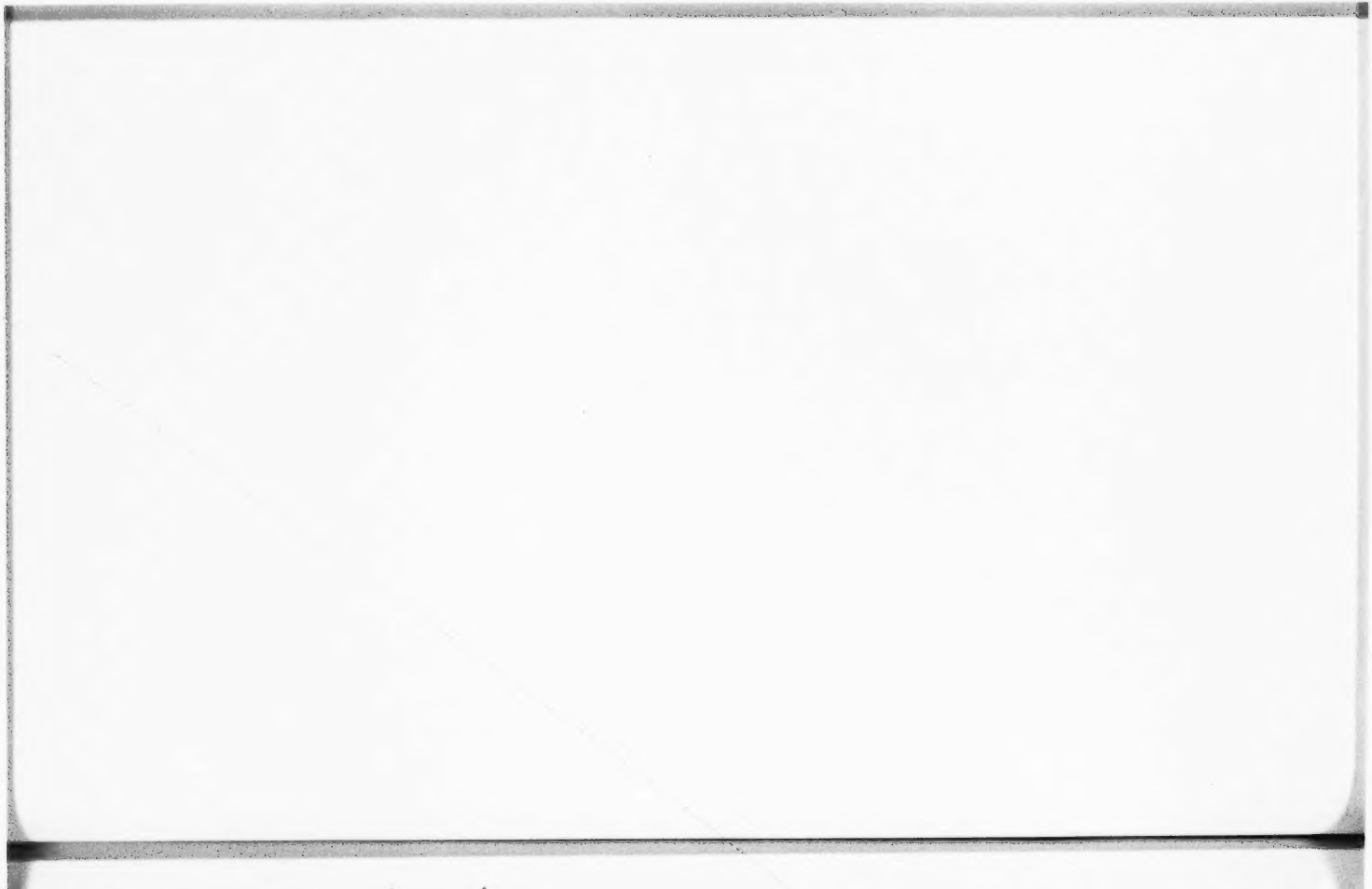
District Court, acting on a motion to vacate, had refused to vacate the judgment.

8. According to the Massachusetts General Laws, Chapter 198, a judgment in the District Court would have been *res adjudicata* in the case pending in the Probate Court of Middlesex County, Massachusetts, and the defendant was entitled to a judgment as a matter of right.

Wherefore it is respectfully submitted that the petition should be granted.

AMOS L. TAYLOR,
Attorney for Petitioners.

FRED J. JOHNSON,
JOHN F. DOHERTY,
Of Counsel.



Supreme Court of the United States.

OCTOBER TERM, 1943.

FRANK W. LYMAN ET AL., EXECUTORS,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts upon which the petition is based appear in the petition and need not be stated here, although they will be somewhat amplified in the course of this brief.

Argument.

The declaration states that the tax was assessed May 25, 1931. The writ is dated May 18, 1938. The petitioners pleaded the Statute of Limitations. It was thus apparent on the record that the statute applied. Counsel for the respondent stated that the suit is not timely brought, and then continued further that, with the permission of the Court, he withdrew that action, he believed a stipulation would be entered withdrawing the action and that it was not before the Court. No stipulation was filed. There was then established in the plaintiff a manifested right. The

case had then progressed so far that the petitioners were entitled to a judgment.

Prudential Insurance Company v. *Stack,* 60 Fed. (2d) 831, states:

> "The rule is well established that a plaintiff may be granted leave to dismiss his suit * * * when the case has not so far progressed as to entitle the defendant to a decree."

The Federal Rules of Civil Procedure relate to pleading, practice and procedure and do not affect the substantive rights of litigants. The Committee, in discussing the rules in Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, at page 183, paragraph 3, states:

> "The Committee concluded that Statutes of Limitations are matters of substantive law and not procedure."

Widdows v. *Keaton,* 44 Fed. (2d), at page 841, states:

> "The defense of the Statute of Limitations to an action is not a mere technical defense, but is substantial, and involves the merits of the right of recovery."

Rules do not give the Court arbitrary power to dismiss. They do not enlarge the discretionary power of the Court. The right to dismiss must be exercised with reference to the right of both litigants. *Chicago & Alton Railroad Company* v. *Union Rolling Mill Company,* 109 U.S. 714.

The motion to dismiss provided for under the Rules is not designed to reach a case in which the plaintiff would not be entitled to relief after the matter of defense had

been presented. In the instant case the matter of defense was distinctly before the Court by the plea of the Statute of Limitations, but the Court refused to take jurisdiction. The right of action here, being an action based on the Internal Revenue Laws, was created by an Act of Congress. *Mutual Life Insurance Company* v. *Krejci,* 123 Fed. (2d) 594, states:

> "The Court may not refuse arbitrarily to exercise jurisdiction when it is invoked by appropriate proceedings. Rather, it must exercise the jurisdiction created by legislative act, in the absence of a showing of facts which constitute a recognized legal ground justifying a refusal to pass on the merits."

The case of *Cohens* v. *Virginia,* 6 Wheat. 264, states that a Federal Court cannot decline to exercise jurisdiction granted by an Act of Congress. At page 404 it states:

> "We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."

Here the Court should have taken jurisdiction because it was created by an Act of Congress and was invoked by appropriate proceedings.

The provision of the Federal Rules of Civil Procedure, Rule 41 (a) 2, is not intended to enlarge the discretionary power of the Court to dismiss. Rule 41 simply provides the method and manner of dismissing. Rule 41 (a) 2 states:

> "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

This is not an arbitrary power. It is conditional, and the condition is providing the Court has the discretionary power to dismiss. It is not intended to deny to a litigant a substantive right. To argue otherwise would allow the Court, in the case of *Mutual Life Insurance Company* v. *Krejci, supra,* to refuse to take jurisdiction, in which case the Court states it is bound to take jurisdiction, and therefore it could not dismiss.

Had the petitioners (defendants), before the trial of the case, made a motion under the Federal Rules of Civil Procedure, Rule 56, for a summary judgment, then based on the pleadings, the petitioners would have been entitled to a judgment as a matter of law. How, then, can the petitioners, at the trial of the case, with the same pleadings and with the further admission by the respondent (plaintiff) that the action was not timely brought, be entitled to anything less than they would have been entitled to under the motion for a summary judgment? With three other causes of action remaining in the declaration, it was deemed advisable not to make the motion for a summary judgment, that it could be accomplished as effectively during the trial of the case, thus saving the time of the Court and both counsel.

By the allowance of the motion to dismiss (R. 15), the petitioners have been deprived of a substantive right without due process of law. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. *Postal Telegraph & Cable Company* v. *Newport,* 247 U.S. 464.

The Court states in the case of *State of Kansas* v. *Occidental Life Insurance Company,* 95 Fed. (2d) 937:

> "The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceedings and the char-

> acter of the rights which may be affected, the order, judgment or decree be entered by a court clothed with jurisdiction of the subject matter, and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense."

In a pending case between the same parties, based on the same cause of action, in the Probate Court of Middlesex County, Massachusetts, the matter is regulated by Massachusetts General Laws, Chapter 198. The estate there had been represented as insolvent and commissioners were appointed and determined the claims. Chapter 198, Section 11, provides that a creditor who was dissatisfied by the action of the Commission may appeal to the Superior Court. Section 13 provides that a judgment rendered shall be conclusive and the list of debts altered by the Probate Court to conform thereto. Section 31 provides that no action shall be maintained against an estate after it is represented insolvent unless it be for a claim entitled to a preference; that the judgment rendered therein shall be conclusive. In the instant case it is a preferred claim and the judgment rendered therein, being conclusive, would be *res adjudicata* in the Probate Court.

The rule is that no appeal will lie from an order denying a motion to vacate or modify a judgment, decree or order. *Republic Steel Company* v. *Richfield Oil Company,* 74 Fed. (2d) 907.

In the case reported, 125 Fed. (2d) 67, between the same parties, based on the same cause of action, the Court states:

> "We conclude that the thing for us to do is to vacate the order (R. 11) of March 31, 1941, amending the original judgment, and to remand the case to the District Court with leave to the plaintiff to move for an order under Rule 41 (b), [subsequently amended to read 'Rule 41 (a) 2'], allowing the plaintiff to dismiss

the first cause of action upon terms and conditions as the Court deems proper."

In thus remanding the case it was not so final as to allow a petition for a writ of certiorari in that case Therefore both cases, 125 Fed. (2d) 67, and the case No. 3911, *Frank W. Lyman et al., Executors, v. United States of America,* are now properly before this Court for a determination of the question here involved; but for the Court in 125 Fed. (2d) 67 to vacate the judgment is the virtual allowing of an appeal from the order (R. 14) denying a motion (R. 11) to vacate a judgment, from which no appeal will lie.

Conclusion.

In bringing an action in the United States Courts with the same case pending in the Probate Court of Middlesex County, Massachusetts, the respondent has chosen the forum in which it wished to prosecute its claim. The petitioners, having been duly summoned, answered to the merits of the claims. They have not had an opportunity to have their defense considered. Had the Court, as it was bound, taken jurisdiction and the plea of the Statute of Limitations been adjudicated, then judgment would have followed for the petitioners. To allow the respondent to dismiss the action deprives the petitioners of property and substantive rights.

Here the issue is not what the petitioners got, but what they should have gotten as a matter of right. The material thing is that the Court should have taken jurisdiction.

Respectfully submitted,
AMOS L. TAYLOR.

FRED J. JOHNSON,
JOHN F. DOHERTY,
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	3
Argument	7
Conclusion	9

CITATIONS

Cases:

Barrett v. *Virginian Ry. Co.*, 250 U. S. 473	6, 7, 9
Bronx Brass Co. v. *Irving Trust Co.*, 297 U. S. 230	6, 7
Cincinnati Traction Bldg. Co. v. *Pullman-Standard Car Mfg. Co.*, 25 F. Supp. 322	8
Cleveland v. *Mercantile Trust Co.*, 45 F. Supp. 205	8
Evans v. *Teche Lines*, 112 F. 2d 933	8
Hawkinson, Paul E., Co. v. *Goodman*, 32 F. Supp. 732	8
Home Owners' Loan Corp. v. *Huffman*, 134 F. 2d 314	8
Jones v. *Securities Commission*, 298 U. S. 1	7
Lawson v. *Moore*, 29 F. Supp. 175	8
McGowan v. *Columbia River Packers' Assn.*, 245 U. S. 352	7
Pullman's Car Co. v. *Transportation Co.*, 171 U. S. 138	7
Skinner & Eddy Corp., Ex parte, 265 U. S. 86	7
United States v. *Commercial Solvents Corp.*, 25 F. Supp. 653	8
United States v. *Lyman*, 36 F. Supp. 53	4
United States v. *Lyman*, 125 F. 2d 67	5, 8, 9
Walker v. *Spencer*, 123 F. 2d 347, certiorari denied, 316 U. S. 692	8

Miscellaneous:

Federal Rules of Civil Procedure:	
Rule 41	2
Rule 60 (a)	4, 8
3 Moore, *Federal Practice*, Secs. 41.02 and 41.03, pp. 3039, 3042	7

564795—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 495

FRANK W. LYMAN ET AL., EXECUTORS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 26–27) is not as yet reported. An opinion of that court on a prior appeal on the same point is reported at 125 F. 2d 67.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 18, 1943. (R. 28.) The petition for a writ of certiorari was filed November 22, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the filing of an answer by the petitioners, which raised the statute of limitations as a defense to the first cause of action contained in the declaration, vested substantive rights in them and precluded the District Court, upon motion of the Government under Rule 41 (a) (2) of the Federal Rules of Civil Procedure, from thereafter dismissing the first cause of action without prejudice to the prosecution of a timely proceeding pending in another court on the same subject matter.

RULE INVOLVED

Federal Rules of Civil Procedure:

> RULE 41. DISMISSAL OF ACTIONS.
>
> (a) *Voluntary Dismissal: Effect Thereof.*
>
> (1) *By Plaintiff; By Stipulation.*—Subject to the provisions of Rule 23 (c) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal signed at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or any state an action based on or including the same claim.

(2) *By Order of Court.*—Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

* * * * *

STATEMENT

On June 28, 1938, the Government filed a declaration in the United States District Court for the District of Massachusetts for the recovery of income taxes for the years 1930 and 1931 and of estate taxes from petitioners as executors of the estate of Jesse P. Lyman, deceased. The complaint contained four separate causes of action, or counts, each based upon a different assessment. (R. 3–7.) The instant petition for a writ of certiorari concerns the disposition of the first cause of action only.

Petitioners filed an answer to the complaint on July 18, 1938, which, among other things, raised the defense of the statute of limitations to the first cause of action (R. 8). When the case came

on for trial on November 19, 1940, without a jury, Government counsel admitted in his opening statement that the suit was not timely as to the first cause of action and, with the court's permission and petitioners' assent, orally withdrew that cause of action from the suit (R. 8, 20). When, at the conclusion of the Government's case, Government counsel stated that "the Government has withdrawn its first cause of action" and petitioners' counsel asserted that it was his understanding that a stipulation to that effect was to be prepared and filed, the court stated that it was unnecessary to file a stipulation—that the first cause of action was "clear out of this case" (R. 21–22). Petitioners then made a motion for a directed verdict on the cause of action (R. 8–9, 22), whereupon the court stated that the motion was improper, reiterating that the first cause of action was "not before" him and that "We are trying this case as if we never heard of any first count" (R. 22). Judgment was entered for the Government on counts 2, 3, and 4 on December 13, 1940, without any mention of count 1 (R. 9–10). The judgment stated, however, that it was entered "In accordance with the opinion of the court handed down this day" (R. 9), which, in turn, stated that the first cause of action "is waived by the government" (R. 16). *United States* v. *Lyman,* 36 F. Supp. 53 (Mass.).

Subsequently, on March 28, 1941, petitioners filed a motion under Rule 60 (a) of the Federal

Rules of Civil Procedure for judgment on the first cause of action and amendment of the record accordingly, asserting that "by error or mistake it does not appear of record herein that judgment was given to the defendants on the first cause of action * * *" (R. 10). Three days later, the court, *ex parte,* allowed the motion and ordered that the original judgment of December 13, 1940, be amended to add "Judgment on the first count for the defendant with prejudice and without costs" (R. 10–11).

The Government then filed a motion to vacate the *ex parte* order amending the original judgment (R. 11–14). The motion was made for the reason, revealed in the motion, that the first cause of action was the subject of action in a pending proceeding in the Probate Court of Middlesex County, Massachusetts, and that if the amended judgment were permitted to stand the Government's claim in that proceeding would be forever barred, resulting in damage to the Government in the amount of $32,520.90, with interest from May 5, 1931 (R. 13–14). The District Court denied the motion on May 13, 1941 (R. 14). The Government appealed, and on January 23, 1942, the Circuit Court of Appeals vacated the order amending the original judgment and remanded the case to the District Court with leave to the Government to move for an order allowing it to dismiss the first cause of action. *United States* v. *Lyman,* 125 F. 2d 67 (C. C. A. 1st).

The Government then filed in the District Court a motion to dismiss the first cause of action (R. 14). The motion was granted, and judgment was entered dismissing the cause of action with prejudice to the commencement of another proceeding upon that cause of action and without prejudice to the right of the Government to prosecute any other timely proceeding then pending in another court upon the same subject matter (R. 15). The judgment was affirmed on appeal (R. 26–28), and it is the validity of this judgment which is involved in the instant case.

ARGUMENT

Petitioners assert that Rule 41 (a) (2) of the Federal Rules of Civil Procedure (*supra,* p. 3) does not authorize a dismissal under the circumstances of this case. Their contention is that the filing of an answer raising the statute of limitations as a defense to the first cause of action vested property and substantive rights in them of which they could not be deprived without violation of the due process clause of the Constitution (Br. 7–12). The contention is plainly lacking in merit.

The right of a plaintiff to dismiss his cause of action is a matter of procedure and practice. *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473, 476; *Bronx Brass Co.* v. *Irving Trust Co.,* 297 U. S. 230, 232. Prior to the effective date of the Federal Rules of Civil Procedure, a plaintiff in an action at law had the unqualified right of dismissal at any time before verdict, if not before

judgment, unless some plain, legal prejudice would result to the defendant other than the mere prospect of a second litigation upon the same subject matter. *Jones* v. *Securities Commission,* 298 U. S. 1, 19–20; *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, 92–94; *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473, 476. If the governing state practice so permitted, the right to dismiss, which this Court has stated "is substantial," could be exercised even after the trial court had indicated an intention to direct a verdict for the defendant. *Barrett* v. *Virginian Ry. Co., supra,* pp. 476–478. In an action in equity, the complainant had the same unqualified right at any time before final hearing, except when the case had proceeded to such a stage that the defendant was in a position to demand an opportunity to seek affirmative relief and would be prejudiced if remitted to a separate action. *Jones* v. *Securities Commission, supra; Ex parte Skinner & Eddy Corp., supra,* p. 93; *Bronx Brass Co.* v. *Irving Trust Co., supra,* p. 232; *McGowan* v. *Columbia River Packers' Assn.,* 245 U. S. 352, 358; *Pullman's Car Co.* v. *Transportation Co.,* 171 U. S. 138, 145–146.

Rule 41 (a) (2) of the Federal Rules of Civil Procedure (*supra,* p. 3) is based upon, and clarifies and restricts, this former practice in law and equity (3 Moore, *Federal Practice,* Sections 41.02 and 41.03, pp. 3039, 3042), making the right of dismissal after the service of an answer subject to the discretion of the District Court if no

stipulation of dismissal is filed. *Home Owners' Loan Corp.* v. *Huffman,* 134 F. 2d 314 (C. C. A. 8th); *Walker* v. *Spencer,* 123 F. 2d 347 (C. C. A. 10th), certiorari denied, 316 U. S. 692; *Evans* v. *Teche Lines,* 112 F. 2d 933, 934 (C. C. A. 5th); *Cleveland* v. *Mercantile Trust Co.,* 45 F. Supp. 205, 207–208 (Md.); *Paul E. Hawkinson Co.* v. *Goodman,* 32 F. Supp. 732, 734 (S. D. Cal.); *Lawson* v. *Moore,* 29 F. Supp. 175 (W. D. Va.); *United States* v. *Commercial Solvents Corp.,* 25 F. Supp. 653 (Del.); *Cincinnati Traction Bldg. Co.* v. *Pullman-Standard Car Mfg. Co.,* 25 F. Supp. 322 (Del.). The dismissal may, under the express provisions of the rule, be without prejudice to the commencement or continuation of another suit involving the same subject matter.

In the instant case, the first cause of action was withdrawn before trial, with the District Court's permission and petitioners' assent. As the Circuit Court of Appeals stated on the first appeal in this case (*United States* v. *Lyman,* 125 F. 2d 67, 70), the failure of the District Court to enter a formal order allowing the dismissal of the cause of action was an "oversight" which the court was empowered, by Rule 60 (a) of the Federal Rules of Civil Procedure,[1] to correct at any time. And,

[1] Rule 60 (a) provides:

"Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

as the same court held on the second appeal (R. 27), the District Court clearly did not abuse its discretion by dismissing the first cause of action without prejudice to the prosecution of any timely proceeding pending in another court on the same subject matter. On the contrary, it is manifest that petitioners are contesting the dismissal solely in an attempt to gain "an obviously undeserved windfall" (*United States* v. *Lyman,* 125 F. 2d at p. 70), of over $32,000 by application of the doctrine of *res judicata* in the pending proceeding in the Probate Court of Middlesex County, Massachusetts, on the same subject matter (see *supra,* p. 5; Br. 11).[2]

CONCLUSION

The case was correctly decided below and involves no conflict of decisions. The petition should be denied.

Respectfully submitted.

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SEWALL KEY,
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Special Assistants to the Attorney General.

DECEMBER 1943.

[2] It is immaterial, of course, that the formal order dismissing the first cause of action was entered after the entry and vacation of judgment on that cause of action. See *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 478.

U. S. GOVERNMENT PRINTING OFFICE: 1943